POWER OF THE COURT TO MODIFY AN ALIMONY DECREE BASED ON AN AGREEMENT OF THE PARTIES

Hunt v. Hunt
169 Ohio St. 276, 159 N.E.2d 430 (1959)

A divorce decree was granted to Virginia Hunt in 1954 for the aggression of her husband, Paul Hunt. Incorporated into the decree was an agreement between the parties (which did not constitute a property settlement and was not related to the support of children), establishing alimony in the amount of $150 a month. In 1956, following the marriage of Virginia Hunt to a man capable of providing her with adequate support, Paul Hunt moved to have the alimony award modified. On appeal from the dismissal of the motion, the Ohio Supreme Court ruled that even though jurisdiction to modify the award had not been expressly reserved in the decree, by remarrying, Virginia Hunt was held to have abandoned the provisions in the decree for her benefit and to have elected to rely solely upon her new husband for support. Reservation of jurisdiction to modify by the decreeing court was implied because the supreme court declared it to be against public policy to require any man to support another man's wife. Accordingly, the alimony award was terminated.

The most controversial issue affected by this decision concerns the power of the court to modify a decree based on an agreement of the parties and awarding permanent installment payments. Ohio has consistently recognized the power of the court to modify a continuing alimony or support decree when not based on an agreement of the parties, irrespective of any express reservation to do so in the original decree.[1] Dictum in some of the early cases intimated that the court's jurisdiction was continuous whenever installment payments were awarded.[2] However, despite a dictum in a 1935 case stating that a divorce decree incorporating a separation agreement supersedes the agreement,[3] the Ohio Supreme Court has accepted the premise that exercising the power to modify a

[1] Smedley v. State, 95 Ohio St. 141, 115 N.E. 1022 (1916); Olney v. Watts, 43 Ohio St. 499, 3 N.E. 354 (1885); Heckert v. Heckert, 57 Ohio App. 421, 14 N.E.2d 428 (1936). The majority of American jurisdictions deny this power by judicial decision, see Annot., 127 A.L.R. 741 (1940).

[2] Smedley v. State, *supra* note 1, at 143, "It is well settled that the jurisdiction of a court in an alimony case is continuing."; Heckert v. Heckert, *supra* note 1 (to the effect that reservation of jurisdiction is implied in an installment decree). Also, see the following cases where this principle is recognized, but for varying reasons the court was held to have exhausted its jurisdiction, Garver v. Garver, 102 Ohio St. 443, 133 N.E. 551 (1921) (prior amended decree terminating alimony); Petersine v. Thomas, 28 Ohio St. 596 (1876) (gross allotment); Robertson v. Robertson, 61 Ohio App. 458, 22 N.E.2d 744 (1938) (gross allotment); Clough v. Long, 8 Ohio App. 420 (1918) (property awarded in lieu of a gross allotment).

[3] Holloway v. Holloway, 130 Ohio St. 214, 198 N.E. 579 (1935), though not overruled, this case has not been followed in Ohio.

decree based on an agreement of the parties would impair the obligations of a contract.[4] The court has repeatedly asserted the law to be that:

> An alimony decree based upon an agreement between the parties is not subject to modification by a court after term in the absence of mistake, misrepresentation or fraud and in the absence of a reservation of jurisdiction with reference thereto.[5]

Ohio's view in this area of the law has been rejected in the vast majority of common law jurisdictions, most of which recognize the power of the court to modify a decree regardless of whether or not it is based on an agreement of the parties. The majority theory is that the agreement is a contract separate from the decree and modification of the decree does not impair the obligations of the contract.[6]

Despite this broad denial of jurisdiction by the court, exceptions to the general rule have been allowed. However, in attempting to qualify under an exception, one discovers that he is confronted by that evershifting concept, public policy. A short analysis of the landmark decisions concerning modification of child support decrees based on an agreement of the parties, will demonstrate how the supreme court has turned public policy on and off in order to find, or deny, the power to modify.

On a motion to increase the child support, decided in 1930,[7] the supreme court ruled that in *any* decree affecting children, public policy required that the state always have the power to provide for the child's welfare, therefore, continuing jurisdiction must be implied even when based on an agreement of the parties. Then in 1941, in *Tullis v. Tullis*,[8] the court limited this continuing jurisdiction solely to motions to *increase* the award. The reason given was that public policy, as stated above, could not justify impairing the contract by *decreasing* the amount. Eleven years later, in *Seitz v. Seitz*,[9] this denial of jurisdiction to decrease the

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[4] For a discussion of the reasons, both pro and con, for this doctrine, see Tullis v. Tullis, 138 Ohio St. 187, 34 N.E.2d 212 (1941).

[5] Mozden v. Mozden, 162 Ohio St. 169, 122 N.E.2d 295 (1954); Newman v. Newman, 161 Ohio St. 247, 118 N.E.2d 649 (1954); Law v. Law, 64 Ohio St. 369, 60 N.E. 560 (1901); Sinclair v. Sinclair, 98 Ohio App. 308, 129 N.E.2d 311 (1954); Joshua v. Joshua, 53 Ohio L. Abs. 561, 87 N.E.2d 106 (Ct. App. 1948); Sedam v. Sedam, 83 Ohio App. 138, 78 N.E.2d 914 (1948); Kintner v. Kintner, 78 Ohio App. 324, 65 N.E.2d 156 (1946); Nash v. Nash, 77 Ohio App. 155, 65 N.E.2d 728 (1945); Heilburn v. Heilburn, 35 Ohio L. Abs. 369, 34 N.E.2d 310 (Ct. App. 1941); Hofer v. Hofer, 35 Ohio L. Abs. 486, 42 N.E.2d 165 (Ct. App. 1940); Miller v. Miller, 79 Ohio L. Abs. 599, 153 N.E.2d 355 (C.P. 1958).

[6] Annot., 166 A.L.R. 675 (1947).

[7] Corbett v. Corbett, 123 Ohio St. 76, 174 N.E. 10 (1930); also, see Connolly v. Connolly, 16 Ohio App. 92 (1922).

[8] Tullis v. Tullis, 138 Ohio St. 187, 34 N.E.2d 212 (1941); also, see Campbell v. Campbell, 46 Ohio App. 197, 188 N.E. 300 (1933).

[9] Seitz v. Seitz, 156 Ohio St. 516, 103 N.E.2d 741 (1952). Compare Robrock v. Robrock, 167 Ohio St. 479, 150 N.E.2d 421 (1958); Stafford v. Stafford, 139 N.E.2d 347 (Ohio Ct. App. 1956); Armstrong v. Armstrong, 99 Ohio App. 7, 139 N.E.2d 471 (1956).

award in *Tullis* was limited only to those occasions in which no words implying, or expressing reservation of jurisdiction could be found in the decree. Three judges stated their desire to overrule *Tullis* completely.

Thus, due to the tenuous premise of the inviolability of a contract when incorporated into a decree, Ohio courts had gotten into the difficult situation of having to look to the facts of a controversy to determine whether circumstances are sufficient to warrant invoking "public policy" to grant the court power to modify the decree. This was certainly "backing into" an equitable solution which could be readily attained by discarding the artificial distinction developed by the Ohio courts, between decrees incorporating an agreement and those based solely on the judge's findings. The courts, by accepting the prevailing view of the separate contract, could declare that they have the *power* to modify *any* decree awarding installment payments and concentrate future decisions toward establishing the circumstances under which this power should be invoked.

Unfortunately, the opinion in the *Hunt* case places the power to modify an alimony decree on the same basis as child support decrees, public policy. Armed with ample Ohio authority that remarriage of the wife provides adequate grounds for an application by the former husband to be relieved from further alimony payments,[10] it was not difficult for the Court to find that the contract obligations in the argeement must yield to the public policy concept that no man should be forced to support another man's wife. A careful comparison of the opinion in the *Hunt* case with that in *Tullis* indicates that they are based on the same considerations, even though *Hunt* permits decreases and *Tullis* increases. The public policy of protecting the husband as set forth in *Hunt*, would allow impairment of the contract only to the extent of decreasing the amount. On the other hand, protecting a child's welfare as in *Tullis*, justifies only an increase in the child support.

The inequities which result from basing the power to modify solely on public policy can be readily seen in the following hypothetical situation. A divorce decree, incorporating an agreement of the parties, establishes permanent alimony at a certain amount per month. Following the divorce, the wife becomes gainfully employed, fully able to adequately

[10] Olney v. Watts, 43 Ohio St. 499, 3 N.E. 354 (1885); King v. King, 38 Ohio St. 370 (1882); Madden v. Madden, 11 Ohio C.C.R.(n.s.) 238 (Cir. Ct. 1908), *aff'd* 83 Ohio St. 506, 94 N.E. 1110 (1911); Baker v. Baker, 4 Ohio App. 170 (1915); Wolfe v. Wolfe, 124 N.E.2d 485 (Ohio C.P. 1954).

The burden is usually on the husband to prove remarriage of the wife and ability of the new husband to furnish adequate support. To continue the award, the wife must show extraordinary circumstances. Apparently the only circumstance found to be sufficient in Ohio is the invalidity of the remarriage, Brenholts v. Brenholts, 19 Ohio L. Abs. 309 (Ct. App. 1935).

Four states, California, Illinois, New Jersey and New York, have enacted legislation which automatically terminates all alimony payable to the wife upon her marriage. For a complete discussion on the effect of remarriage of the wife on decrees for alimony, see Annot., 48 A.L.R.2d 270 (1956).

support herself. The husband is injured, losing his job, and therefore, becomes unable to meet the alimony payments awarded in the decree. Certainly these changed circumstances would dictate that the payments at least be temporarily terminated or decreased. However, since the husband is still under a legal duty to support his ex-wife, public policy will not justify impairing the obligations of the contract until, or unless, the wife remarries. Because of these decisions, the status of the law is that unless the party moving for modification of the decree has managed to have included in the decree, along with the agreement, reservation of the power to modify, he is faced with the difficult tack of persuading the court that his situation is such that public policy should be invoked in order to justify finding the power to modify the decree.

By refusing to overrule the early cases establishing the distinction between decrees,[11] and by basing its power to modify in the *Hunt* case on public policy, the Supreme Court failed to take advantage of a perfect situation to end the confusion as to when the court has the power to modify a decree. More equitable, and certainly more coherent results could be obtained by repudiating the contract and public policy theories and recognizing the power of the court to modify *all* decrees ordering installment payments.

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[11] *Supra* note 5.